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**IN THE
COURT OF APPEALS OF INDIANA**

SAMUEL L. HOBBS, JR.,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 18A04-0602-CR-95

APPEAL FROM THE DELAWARE CIRCUIT COURT

The Honorable Wayne J. Lennington, Judge

Cause No. 18C05-0506-FA-12

January 24, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Samuel L. Hobbs, Jr. (Hobbs), appeals his conviction and sentence for Count I, residential entry, a Class D felony, Ind. Code § 35-43-2-1.5, Count II, battery with bodily injury, a Class A misdemeanor, I.C. § 35-42-2-1(a)(1), and Count III, criminal deviate conduct, a Class B felony, I.C. § 35-42-4-2 (a)(1).

We affirm.

ISSUES

Hobbs raises three issues on appeal, which we restate as:

- (1) Whether the trial court abused its discretion when it permitted witnesses to testify regarding the contents of an anonymous telephone call they received;
- (2) Whether the trial court properly denied Hobbs' Motion to Dismiss the charges when instead the trial court prohibited introduction of supplemental DNA evidence and struck related expert witness testimony from the record; and
- (3) Whether the trial court properly sentenced Hobbs.

FACTS AND PROCEDURAL HISTORY

In the fall of 2003, Hobbs met L.M. at work. Early in 2004, they became romantically involved. Throughout their relationship Hobbs lived in various locations and, while he never lived with L.M., he occasionally spent the night with her. In the fall of 2004, as their relationship began to subside, Hobbs insisted he needed L.M.'s help in overcoming his drug addiction. Hobbs did not see L.M. between February of 2005 and June 19, 2005, although they wrote each other and spoke on the phone.

On June 19, 2005, Hobbs was released from prison. Hobbs and L.M. met at St. Francis church for the 9:00 a.m. service, after which L.M. drove Hobbs to cash a money order, then dropped him off at a Wendy's restaurant. From there, L.M. went to visit her parents. She did not see or speak with Hobbs the rest of the day. Upon returning home, L.M. had several messages from Hobbs on her answering machine that "started out nice and seemed to end up very violent, hateful." (Transcript p. 181).

At 11:18 p.m., L.M. was awakened when she felt Hobbs crawling into bed with her. She told him to leave, but he refused and became physical, throwing her on her back, and eventually removing her pants and underwear, as well as his own clothing. Hobbs proceeded to put his finger in her vagina, followed by his penis. He later performed oral sex on her and penetrated her anally. L.M. fought Hobbs screaming and yelling for her neighbor, Lori Ford (Ford), all the while telling Hobbs to "stop, get off, leave me alone," and that it "hurt." (Tr. pp. 190-91). Hobbs responded by telling her to shut up and covering her mouth with his hands. L.M. attempted to call 911, but Hobbs took the telephone from her and threw it. L.M. found the telephone under her bed the next day.

While L.M.'s encounter with Hobbs was happening, Ford was walking her dog underneath L.M.'s open bedroom window. Ford heard loud, piercing screams coming from the window. Ford called 911 to report that her neighbor was being attacked, and stayed on the line with the 911 operator until the police arrived.

Officers Doug Narramore and Michael Shaffer (the Officers) responded to Ford's 911 call. The Officers heard cries for help coming from L.M.'s window. The Officers

also saw a man later identified as Hobbs in the window and heard him advise L.M. to tell them to leave. L.M. refused and proceeded outside as instructed by the Officers. The Officers entered L.M.'s home, located Hobbs, handcuffed him, and removed him from the home. Officer Rodney Frasier photographed the scene and obtained hair and blood samples from Hobbs. L.M. was taken to Ball Memorial Hospital where she underwent a physical examination, including whether there was evidence of a sexual trauma.

That same evening between 11:00 and 11:30 p.m., Clark Tudor (Clark) was at home watching a basketball game when one of the two phone lines in his house rang; his wife Faye was asleep. He said hello, twice, but there was no response, so he just listened. He heard an unfamiliar female voice crying, "You're hurting me," and an equally unfamiliar male voice saying, "Shut up. Shut up. Be quiet." (Tr. p. 376). Then, he heard the woman scream, "unlike any other scream [he]'d ever heard in [his] life. It was a blood curdling scream." (Tr. p. 378).

Clark awoke his wife. He put the call on speakerphone in the kitchen where they both listened in on the call. Faye heard someone calling for Rory, or Lori as well as multiple screams, after which she went into the bedroom and called 911 on their other telephone line. She believed someone was "getting raped because it was really screaming." (Tr. p. 367). The phone call was traced by the 911 supervisor to L.M.'s house.

On June 22, 2005, the State filed an Information charging Hobbs with Count I, burglary resulting in bodily injury, a Class A felony, I.C. § 35-43-2-1, Count II, rape, a Class B felony, I.C. § 35-42-4-1(a)(1), and Count III, criminal deviate conduct, a Class B

felony, I.C. § 35-42-4-2(a)(1). On January 10 through 12, 2006, a jury trial was held resulting in the following convictions: Count I, residential entry, a Class D felony; Count II, battery with bodily injury, a Class A misdemeanor; and Count III, criminal deviate conduct, a Class B felony. On February 7, 2006, Hobbs was sentenced to three years on Count I, residential entry, one year on Count II, battery with bodily injury, and twenty years on Count III, criminal deviate conduct, with Count I to run consecutive to Count III and Count II to run concurrent to Count III for an aggregate sentence of 23 years.

Hobbs now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Admission of the Tudors' Testimony

Hobbs first argues that the trial court abused its discretion when it allowed Clark and Faye Tudor (collectively, the Tudors) to testify as to what they heard on the other end of the random phone call received the night of June 19, 2005. Specifically, Hobbs asserts that because the Tudors could not identify Hobbs, or L.M., a proper foundation had not been laid with respect to their testimony.

In *Thomas v. State*, 734 N.E.2d 572, 573 (Ind. 2000), our supreme court held that a caller's identity could be established by circumstantial evidence, and need not be proven beyond a reasonable doubt. Additionally, Ind. Evidence Rule 901(a) states:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Thus, when evidence establishes a reasonable probability that an item is what it is claimed to be, the item is admissible. *Thomas*, 734 N.E.2d at 573. When a trial court has

made a ruling concerning the sufficiency of the foundation laid to justify the admission of evidence, we review that decision for an abuse of discretion. *Id.* An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Dorsey v. State*, 802 N.E.2d 991, 993 (Ind. Ct. App. 2004).

The record in the instant case shows that on June 19, 2005, someone placed a call to the Tudors' home. The caller did not identify him/herself. Rather, the Tudors listened to the occurrences on the other end of the call. After hearing several screams, Faye went into her bedroom and placed a call to 911 on the their other phone line. Clark remained on the phone with the anonymous caller. The 911 supervisor traced the origin of the anonymous call to L.M.'s home. The supervisor was advised officers were already en route to that address. The State went on to call the Tudors to testify, individually, over objection, as to the content of the conversation they heard from the other end of the anonymous phone call.

As we have already indicated, a caller's identity can be established by circumstantial evidence. *See Thomas*, 734 N.E.2d at 573. Thus, because the Tudors' could not identify the voices coming from the other end of the telephone line themselves does not mean they were precluded from testifying. L.M. tried to call 911 and although she was unable to complete the call she found her phone under the bed the next day, with the phone line open. The call the Tudors received within the timeframe of L.M.'s encounter with Hobbs was traced to L.M.'s house. Additionally, L.M. called out for her neighbor, Lori. And, Ford and the Officers heard screams coming from L.M.'s bedroom.

Therefore, based on the record, we find the trial court did not abuse its discretion in admitting the Tudors' testimony into evidence.

II. *Expert Witness Testimony*

Next, Hobbs argues that the trial court erred in failing to dismiss the charges against him when the State introduced testimony from an expert witness that had not been disclosed to Hobbs, despite numerous requests for exactly that information. In response, the State suggests that Hobbs has waived this issue for review because he failed to support his contentions with any cogent reasoning, citation to authorities, statutes, or relevant portions of the record. We agree.

Ind. Rule of Appellate Procedure 46(A)(8)(a), in relevant part, provides:

The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.

Hobbs has failed to comply with this rule. Thus, he has waived this issue for review. *See Marshall v. State*, 621 N.E.2d 308, 318 (Ind. 1993); *see also Hull v. State*, 839 N.E.2d 1250, 1256 (Ind. Ct. App. 2005).

III. *Hobbs' Sentence*

Lastly, Hobbs contends that the trial court improperly sentenced him to an enhanced sentence. Specifically, Hobbs believes that the trial court abused its discretion by improperly evaluating and weighing the aggravating and mitigating circumstances. As such, Hobbs claims his sentence is excessive and should be revised.

Recently, in *McMahon v. State*, ___ N.E.2d ___, 2006 WL 3258325 (Ind. Ct. App. November 13, 2006), this court discussed in detail the recent developments of Indiana’s sentencing laws. We concluded, in pertinent part, “a claim that a sentence arose from an abuse of discretion under our statutory guidelines is no longer viable” since “trial courts are allowed to impose *any* sentence authorized by statute *regardless* of the presence or absence of aggravating and mitigating circumstances.” *Id.* at 4. However, we will continue to include “an assessment of the trial court’s finding and weighing of aggravators and mitigators” in our independent review under Ind. Appellate R. 7(B). *Id.* As such, “the burden falls to the defendant to persuade the appellate court that his or her sentence is inappropriate” given that our review is by no way limited “to a simple rundown of the aggravating and mitigating circumstances found by the trial court.” *Id.* at 5-6. Although, Hobbs has not requested we review his sentence pursuant to App. R. 7(B), we will discuss his sentence on the merits.

The new advisory sentencing scheme eliminated our review of the trial court’s sentencing pronouncement for abuse of discretion. Rather, as aforementioned, the burden is now Hobbs’ to persuade us that his sentence is inappropriate. *See McMahon*, 2006 WL at 5. Accordingly, we do not find Hobbs’ argument persuasive. To the contrary, we find the trial court’s sentence to be appropriate. And although not required, we acknowledge the trial court’s explanation of Hobbs’ sentence based on the balancing of the aggravating and mitigating factors it recognized. Indiana Appellate Rule 7(B) gives us the authority to revise a sentence authorized by statute if, after due consideration of the trial court’s decision, we find that the sentence is inappropriate in light of the nature of the offense

and the character of the offender. *See* Ind. App. R. 7(B). In *Jordan v. State*, 787 N.E.2d 993, 997 (Ind. Ct. App. 2003), we reiterate that maximum sentences should be left to the worst offenders and should be appropriate in light of the character of the offender.

With respect to Hobbs' character, as the trial court notes, his criminal history progresses in severity from speeding tickets and seat belt violations to possession of controlled substances, criminal trespass, and theft to the instant offenses. Hobbs was also released from jail in the morning and by that evening had committed the instant offenses. Furthermore, the instant offenses did not just happen they had to be planned. Part of the planning process is evident through the letters he wrote to the victim in which he stated he was coming to get what was his. Incidentally, he does not know the whereabouts of two of his children. As such, we are less than eager to revisit the sentence imposed by the trial court. We find the trial court's sentence of twenty-three years appropriate in light of Hobbs' character. Based on finding Hobbs' sentence appropriate with respect to his character, we need not discuss whether Hobbs' sentence is appropriate with respect to the nature of this crime.

CONCLUSION

Based on the foregoing, we conclude (1) that the trial court did not abuse its discretion by allowing into evidence the Tudors' testimony regarding the content of the anonymous telephone call they received; (2) Hobbs waived review of his argument challenging the expert testimony; and (3) the trial court properly sentenced Hobbs.

Affirmed.

KIRSCH, C.J., and FRIEDLANDER, J., concur.